

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR 19-2848 JB

VICTOR KEARNEY and ROBERT FISER,

Defendant.

**COURT'S FINAL JURY INSTRUCTIONS**  
(with citations)

## INSTRUCTION NO. 1

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges, you are the other. I am the judge of the law. You, as jurors, are the judges of the facts. I presided over the trial and decided what evidence was proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

In explaining the rules of law that you must follow, first, I will give you some general instructions which apply in every criminal case -- for example, instructions about burden of proof and insights that may help you to judge the believability of witnesses. Then, I will give you some specific rules of law that apply to this particular case and, finally, I will explain the procedures you should follow in your deliberations, and the possible verdicts you may return. These instructions will be given to you for use in the jury room, so you need not take notes.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONSS** 1.03 at xi, 8 (2021 Edition)(**INTRODUCTION TO FINAL INSTRUCTIONS**)

## INSTRUCTION NO. 2

You, as jurors, are the judges of the facts. But in determining what actually happened -- that is, in reaching your decision as to the facts -- it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences. However, you should not read into these instructions, or anything else I may have said or done, any suggestion as to what your verdict should be. That is entirely up to you.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.04, at 9 (2021 Edition)(**DUTY TO FOLLOW INSTRUCTIONS**)

### INSTRUCTION NO. 3

The government has the burden of proving Mr. Kearney guilty beyond a reasonable doubt. The law does not require Mr. Kearney to prove his innocence or produce any evidence at all. The government has the burden of proving Mr. Kearney guilty beyond a reasonable doubt, and if it fails to do so, you must find Mr. Kearney not guilty.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of Mr. Kearney's guilt. There are few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning Mr. Kearney's guilt. A reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case. If, based on your consideration of the evidence, you are firmly convinced that Mr. Kearney is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.05, at 10 (2021 Edition)(**PRESUMPTION OF INNOCENCE -- BURDEN OF PROOF -- REASONABLE DOUBT**)(modified)

#### **INSTRUCTION NO. 4**

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath and the exhibits that I allowed into evidence.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

During the trial, I did not let you hear the answers to some of the questions that the lawyers asked. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.06, at 13 (2021 Edition)(**EVIDENCE -- DEFINED**)

## INSTRUCTION NO. 5

There are, generally speaking, two types of evidence from which a jury may properly determine the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, that is, the proof of a chain of facts that point to the existence or non-existence of certain other facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence. The law simply requires that you find the facts in accord with all the evidence in the case, both direct and circumstantial.

While you must consider only the evidence in this case, you are permitted to draw reasonable inferences from the testimony and exhibits, inferences you feel are justified in the light of common experience. An inference is a conclusion that reason and common sense may lead you to draw from facts that have been proved.

By permitting such reasonable inferences, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in this case.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS 1.07**, at 15 (2021 Edition)  
**(EVIDENCE -- DIRECT AND CIRCUMSTANTIAL -- INFERENCES)**

## **INSTRUCTION NO. 6**

I remind you that it is your job to decide whether the government has proved the guilt of Mr. Kearney beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or “believability” of each witness and the weight to be given to the witness’s testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should think about the testimony of each witness you have heard and decide whether you believe all or any part of what each witness had to say, and how important that testimony was. In making that decision, I suggest that you ask yourself a few questions: Did the witness impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome in this case? Did the witness have any relationship with either the government or Mr. Kearney? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he/she testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness’s testimony differ from the testimony of other witnesses? When weighing the conflicting testimony, you should consider whether the discrepancy has to do with a material fact or with an unimportant detail. And you should keep in mind that innocent misrecollection -- like failure of recollection -- is not uncommon.

Mr. Kearney did not testify and I remind you that you cannot consider his decision not to testify as evidence of guilt. I want you to clearly understand, please, that the Constitution of the United States grants to Mr. Kearney the right to remain silent. That means the right not to testify or call any witnesses. That is a constitutional right in this country, it is very carefully guarded, and

you should understand that no presumption of guilt may be raised and no inference of any kind may be drawn from the fact that Mr. Kearney does not take the witness stand and testify or call any witnesses.

In reaching a conclusion on a particular point, or ultimately in reaching a verdict in this case, do not make any decisions simply because there were more witnesses on one side than on the other.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.08, at 16-17 (2021 Edition) (**CREDIBILITY OF WITNESSES**)(modified)



### **INSTRUCTION NO. 7**

An accomplice is someone who joined with another person in committing a crime, voluntarily and with common intent. The testimony of an accomplice may be received in evidence and considered by you, even though it is not supported by other evidence. You may decide how much weight it should have.

You are to keep in mind, however, that accomplice testimony should be received with caution and considered with great care. You should not convict Mr. Kearney based on the unsupported testimony of an alleged accomplice, unless you believe the unsupported testimony beyond a reasonable doubt.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.14, at 27 (2021 Edition) (**ACCOMPLICE -- INFORMANT -- IMMUNITY**)(modified)

## INSTRUCTION NO. 8

The government called as one of its witnesses an alleged accomplice, who was named as a co-defendant in the indictment. The government has entered into a plea agreement with the co-defendant, Robert Fiser, providing that: (i) the government will recommend a sentence at the low end of the guideline imprisonment range; and (ii) the government will not bring additional criminal charges against Mr. Fiser arising out of the facts forming the basis of the present indictment. Plea bargaining is lawful and proper, and the rules of this court expressly provide for it.

An alleged accomplice, including one who has entered into a plea agreement with the government, is not prohibited from testifying. On the contrary, the testimony of an alleged accomplice may, by itself, support a guilty verdict. You should receive this type of testimony with caution and weigh it with great care. You should never convict Mr. Kearney upon the unsupported testimony of an alleged accomplice, unless you believe that testimony beyond a reasonable doubt. The fact that an accomplice has entered a guilty plea to the offense charged is not evidence of the guilt of any other person.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.15, at 29 (2021 Edition) (**ACCOMPLICE -- CO-DEFENDANT -- PLEA AGREEMENT**)(adapted)

### **INSTRUCTION NO. 9**

The testimony of a drug abuser must be examined and weighed by the jury with greater caution than the testimony of a witness who does not abuse drugs.

Robert Fiser may be considered to be an abuser of drugs.

You must determine whether the testimony of that witness has been affected by the use of drugs or the need for drugs.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.16, at 30 (2021 Edition) **(WITNESS'S USE OF ADDICTIVE DRUGS)**(modified)

## INSTRUCTION NO. 10

During the trial, you heard the testimony of John Vierra, an Internal Revenue Service (IRS) revenue agent, who expressed opinions concerning the filing requirements for individual taxpayers, the statutory due dates for filing individual tax returns and refund requests, how and when amended tax returns are filed, how losses are reported to the IRS, and how losses affect tax liability; the testimony of Roman Hernandez, who expressed opinions concerning information and records maintained by the IRS, as well as IRS operations such as return processing, collection of delinquent taxes, and routine record-keeping; and the testimony of Myrle Schwalm, a certified public accountant, who expressed opinions concerning accounting, finance, tax return preparation, and the Internal Revenue Code. In some cases, such as this one, scientific, technical, or other specialized knowledge may assist the jury in understanding the evidence or in determining a fact in issue. A witness who has knowledge, skill, experience, training or education, may testify and state an opinion concerning such matters.

You are not required to accept such an opinion. You should consider opinion testimony just as you consider other testimony in this trial. Give opinion testimony as much weight as you think it deserves, considering the education and experience of the witness, the soundness of the reasons given for the opinion, and other evidence in the trial.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.17, at 31 (2021 Edition)(**EXPERT WITNESS**)(adapted)

### **INSTRUCTION NO. 11**

Certain charts and summaries have been shown to you to help explain the evidence in this case. Their only purpose is to help explain the evidence. These charts and summaries are not evidence or proof of any facts.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.41, at 65 (2021 Edition)(**SUMMARIES AND CHARTS**)

## INSTRUCTION NO. 12

In the Indictment, the Grand Jury charges:

### INTRODUCTION

1. The defendant, **VICTOR KEARNEY** (hereinafter, “**KEARNEY**”), was, at all times relevant to this indictment, a beneficiary of the Mary Pat Abruzzo-Kearney Testamentary Trust B and C. **KEARNEY** received income from the trusts on an annual basis.

2. The defendant, **ROBERT FISER** (hereinafter, “**FISER**”), was, at all times relevant to this indictment, a licensed attorney in the State of New Mexico. **FISER** specialized in tax law and prepared federal income tax returns for clients, including **KEARNEY**.

### Count 1

3. From on or about October 20, 2009, to on or about October 1, 2014, in Bernalillo County, in the District of New Mexico, and elsewhere, the defendants, **KEARNEY** and **FISER**, knowingly, unlawfully, and willfully combined, conspired, confederated, agreed, and acted interdependently with one another and with others known and unknown to the Grand Jury to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful Government function of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of the revenue: to wit, income taxes, as further set forth below.

### Manner and Means

4. The manner and means by which **KEARNEY and FISER** sought to accomplish the objectives of the conspiracy included, among other things, the following:

5. Preparing and signing federal income tax returns substantially underreporting the taxable income of **KEARNEY**;

6. Filing federal income tax returns with the Internal Revenue Service substantially underreporting the taxable income of **KEARNEY**;
7. Making false statements about federal income tax returns for **KEARNEY**;
8. Communicating about the preparation and filing of false tax returns and the concealment of such criminal conduct.

#### OVERT ACTS

9. On or about October 23, 2009, **KEARNEY** signed a 2007 U.S. Individual Income Tax Return, Form 1040, failing to report that **KEARNEY** received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.
10. On or about August 3, 2011, **KEARNEY** signed a 2008 U.S. Individual Income Tax Return, Form 1040, failing to report that **KEARNEY** received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.
11. On or about June 17, 2012, **KEARNEY** signed a 2009 U.S. Individual Income Tax Return, Form 1040, failing to report that **KEARNEY** received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.
12. On or about June 17, 2012, **KEARNEY** signed a 2010 U.S. Individual Income Tax Return, Form 1040, failing to report that **KEARNEY** received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.
13. On or about September 6, 2013, **KEARNEY** signed a 2011 U.S. Individual Income Tax Return, Form 1040, failing to report that **KEARNEY** received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.

14. On or about October 1, 2014, **FISER** sent an email message to **KEARNEY** advising **KEARNEY** not to contact the Internal Revenue Service about the failure to file tax returns.

In violation of 18 U.S.C. § 371.

Count 2

15. On or about September 6, 2013, in the District of New Mexico and elsewhere, the defendant, **VICTOR KEARNEY**, willfully made and subscribed a U.S. Individual Income Tax Return, Form 1040, which was verified by a written declaration that it was made under the penalties of perjury and which he did not believe to be true and correct as to every material matter. That U.S. Individual Income Tax Return, Form 1040, which was prepared and signed in the District of New Mexico and elsewhere and was filed with the Internal Revenue Service, stated that the taxable income for **KEARNEY** for calendar year 2011 was the sum of -\$319,297, and that the amount of tax due and owing thereon was the sum of \$0.00, whereas, as he then and there knew his taxable income for the calendar year 2011 was substantially in excess of the reported amount, upon which additional taxable income there was owing to the United States of America.

In violation of 26 U.S.C. § 7206(1).

Indictment, filed August 27, 2019 (Doc. 2)(modified).



### INSTRUCTION NO. 13

Mr. Kearney is charged in count 1 with a violation of 18 U.S.C. § 371.

This law makes it a crime to conspire to commit an offense against the United States.

To find Mr. Kearney guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

*First:* Mr. Kearney agreed with at least one other person to violate the law.

*Second:* one of the conspirators engaged in at least one overt act furthering the conspiracy's objective.

*Third:* Mr. Kearney knew the essential objective of the conspiracy.

*Fourth:* Mr. Kearney knowingly and voluntarily participated in the conspiracy.

*Fifth:* there was interdependence among the members of the conspiracy; that is, the members, in some way or manner, intended to act together for their shared mutual benefit within the scope of the conspiracy charged.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 2.19, at 111 (2021 Edition)(**CONSPIRACY**)(modified)

#### **INSTRUCTION NO. 14**

When the word “knowingly” is used in these instructions, it means that the act was done voluntarily and intentionally, and not because of mistake or accident.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.37, at 59 (2021 Edition)(**KNOWINGLY -- DELIBERATE IGNORANCE**)(modified)

## INSTRUCTION NO. 15

Your verdict must be unanimous. Count 1 of the indictment accuses Mr. Kearney of committing the following acts:

1. On or about October 23, 2009, Mr. Kearney signed a 2007 U.S. Individual Income Tax Return, Form 1040, failing to report that Mr. Kearney received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.

2. On or about August 3, 2011, Mr. Kearney signed a 2008 U.S. Individual Income Tax Return, Form 1040, failing to report that Mr. Kearney received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.

3. On or about June 17, 2012, Mr. Kearney signed a 2009 U.S. Individual Income Tax Return, Form 1040, failing to report that Mr. Kearney received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.

4. On or about June 17, 2012, Mr. Kearney signed a 2010 U.S. Individual Income Tax Return, Form 1040, failing to report that Mr. Kearney received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.

5. On or about September 6, 2013, Mr. Kearney signed a 2011 U.S. Individual Income Tax Return, Form 1040, failing to report that Mr. Kearney received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.

6. On or about October 1, 2014, Fiser sent an email message to Mr. Kearney advising Mr. Kearney not to contact the Internal Revenue Service about the failure to file tax returns.

The government does not have to prove all of these different acts for you to return a guilty verdict on count 1.

But in order to return a guilty verdict, all twelve of you must agree upon which of the listed acts, if any, Mr. Kearney committed *and* that he committed at least one of the acts listed.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.24, at 39 (2021 Edition)(**UNANIMITY OF THEORY**)(modified)

## INSTRUCTION NO. 16

Mr. Kearney is further charged in count 2 with a violation of 26 U.S.C. § 7206(1).

This law makes it a crime for anyone willfully to make a false material statement on an income tax return.

To find Mr. Kearney guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

*First:* Mr. Kearney signed an income tax return that contained a written declaration that it was made under the penalties of perjury;

*Second:* the return contained a false statement that the taxable income for Mr. Kearney for the calendar year 2011 was the sum -\$319,297.00, and that the amount of tax due and owing thereon was the amount of \$0.00;

*Third:* Mr. Kearney knew that statement was false;

*Fourth:* Mr. Kearney acted willfully, that is, with the voluntary intent to violate a known legal duty;

*Fifth:* the statement was material; and

*Sixth:* Mr. Kearney filed or caused someone to file the income tax return with the Internal Revenue Service.

The tax return must be false as to the statement that the taxable income for Mr. Kearney for the calendar year 2011 was the sum -\$319,297.00, and that the amount of tax due and owing thereon was the amount of \$0.00. The government, however, is not required to prove that Mr. Kearney owed any additional tax for the year in question. A monetary loss to the government is not an element of this crime.

The fact that an individual's name is signed to a return means that you may find that the tax return was in fact signed by that individual, until and unless outweighed by evidence presented

which leads you to a different conclusion. If you find proof beyond a reasonable doubt that Mr. Kearney signed his tax return, you may, but are not required to, find that Mr. Kearney knew of the false matter in the return.

A statement is material under this law if it concerned a matter necessary to the correct computation of taxes owed and was capable of influencing the decision of the Internal Revenue Service.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 2.93, at 335-36 (2021 Edition)(**FALSE STATEMENTS ON INCOME TAX RETURN**)(modified)

### **INSTRUCTION NO. 17**

The crime of making a false statement on a tax return requires the government to prove beyond a reasonable doubt that Mr. Kearney acted willfully. The term “willfully” means to voluntarily and intentionally violate a known legal duty.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.38, at 60-61 (2021 Edition)(**WILLFULLY -- TO ACT**)

**UNITED STATES’ AMENDED REQUESTED JURY INSTRUCTIONS, UNITED STATES’ REQUESTED INSTRUCTION NO. 19**, at 26, filed March 3, 2023 (Doc. 109).

### INSTRUCTION NO. 18

One element that the government must prove beyond a reasonable doubt is that Mr. Kearney had the unlawful intent to make a false material statement on the income tax return form for calendar year 2011. Evidence that Mr. Kearney in good faith followed the advice of counsel would be inconsistent with such an unlawful intent. Unlawful intent has not been proved if Mr. Kearney, before acting, (i) requested for advice of counsel on the legality of a proposed action; (ii) made full disclosure of the relevant facts to counsel; (iii) received advice from counsel that the action to be taken will be legal; and (iv) relied in good faith on counsel's advice.

Jury Instructions Committee of the United States Court of Appeals for the Ninth Circuit, **MODEL CRIMINAL JURY INSTRUCTIONS** 4.11, at 76 (2022 Edition)(**ADVICE OF COUNSEL**)(modified); C.E. Carlson, Inc. v. S.E.C., 859 F.2d 1429, 1436 (10th Cir. 1988).



### **INSTRUCTION NO. 19**

You will note that the indictment charges that the crimes were committed on or about October 20, 2009, to on or about October 1, 2014. The government must prove beyond a reasonable doubt that Mr. Kearney committed the crimes reasonably near October 20, 2009, to on or about October 1, 2014.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.18, at 3 (2021 Edition)(**ON OR ABOUT**)(modified)

## INSTRUCTION NO. 20

You are here to decide whether the government has proved beyond a reasonable doubt that Mr. Kearney is guilty of the crimes charged. Mr. Kearney is not on trial for any act, conduct, or crime not charged in the indictment.

It is not up to you to decide whether anyone who is not on trial in this case should be prosecuted for the crime charged. The fact that another person *also* may be guilty is no defense to a criminal charge.

The question of the possible guilt of others should not enter your thinking as you decide whether Mr. Kearney has been proved guilty of the crime charged, unless I expressly instruct you otherwise.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.19, at 33 (2021 Edition)(**CAUTION -- CONSIDER ONLY CRIME CHARGED**)(adapted)

## **INSTRUCTION NO. 21**

If you find Mr. Kearney guilty, it will be my duty to decide what the punishment will be. You should not discuss or consider the possible punishment in any way while deciding your verdict.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.20, at 34 (2021 Edition)(**CAUTION -- PUNISHMENT (Non-Capital Cases)**)(modified)

## **INSTRUCTION NO. 22**

A separate crime is charged against Mr. Kearney in each count of the indictment. You must separately consider the evidence against Mr. Kearney on each count and return a separate verdict for Mr. Kearney.

Your verdict as to any one count, whether it is guilty or not guilty, should not influence your verdict as to any other count.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.22, at 36 (2021 Edition)(**MULTIPLE DEFENDANTS – MULTIPLE COUNTS**)(modified)

### **INSTRUCTION NO. 23**

In a moment, the Courtroom Deputy Clerk will escort you to the jury room and provide each of you with a copy of the instructions I have just read. Any exhibits admitted into evidence will also be placed in the jury room for your review.

When you go to the jury room, you should first select a foreperson, who will help guide your deliberations and will speak for you here in the courtroom. The second thing you should do is review the instructions. Not only will your deliberations be more productive if you understand the legal principles upon which your verdict must be based, but for your verdict to be valid, you must follow the instructions throughout your deliberations. Remember, you are the judges of the facts, but you are bound by your oath to follow the law stated in the instructions.

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

You must consult with one another and deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if you are convinced that you were wrong. But do not give up your honest beliefs solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges -- judges of the facts. You must decide whether the government has proved Mr. Kearney guilty beyond a reasonable doubt.

A form of verdict has been prepared for your convenience.

**[Explain the Verdict Form]**

The foreperson will write the unanimous answer of the jury in the space provided for each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the Court Security Officer. I will either reply in writing or bring you back into the court to respond to your message. Under no circumstances should you reveal to me the numerical division of the jury.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.23, at 37-38 (2021 Edition)(**DUTY TO DELIBERATE -- VERDICT FORM**)(adapted)

## **INSTRUCTION NO. 24**

Members of the jury, in a moment, I am going to ask that you go to the jury room and deliberate. I realize that you may have some difficulty reaching a unanimous agreement, but that is not unusual. Sometimes, after further discussion, jurors are able to work out their differences and agree.

This is an important case. If you should fail to agree upon a verdict, the case is left open and must be tried again. Obviously, another trial would require the parties to make another large investment of time and effort, and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you.

You are reminded that Mr. Kearney is presumed innocent, and that the government, not Mr. Kearney, has the burden of proof and it must prove Mr. Kearney guilty beyond a reasonable doubt. Those of you who may believe that the government has proved Mr. Kearney guilty beyond a reasonable doubt should stop and ask yourselves if the evidence is really convincing enough, given that other members of the jury may not be convinced. And those of you who may believe that the government has not proved Mr. Kearney guilty beyond a reasonable doubt should stop and ask yourselves if the doubt you have is a reasonable one, given that other members of the jury may not share your doubt. In short, every individual juror should reconsider his or her views.

It is your duty, as jurors, to consult with one another and deliberate with a view toward reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous. But do not surrender your

honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

What I have just said is not meant to rush or pressure you into agreeing on a verdict. Take as much time as you need to discuss things. There is no hurry.

In a moment, I will ask that you retire and begin your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the instructions I have previously given you.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.42, at 66-67 (2021 Edition)(**MODIFIED ALLEN INSTRUCTION**)(modified)



## **INSTRUCTION NO. 25**

Let me remind you again that nothing I have said in these instructions, nor anything I have said or done during the trial, was meant to suggest to you what I think your decision should be. That is your exclusive responsibility.

Criminal Pattern Jury Instruction Committee of the United States Circuit Court of Appeals for the Tenth Circuit, **CRIMINAL PATTERN JURY INSTRUCTIONS** 1.44, at 70 (2021 Edition)(**COMMUNICATION WITH THE COURT**)(modified)

## **INSTRUCTION NO. 26**

Faithful performance by you of your duties is vital to the administration of justice.

United States v. Gaspar Leal, No. CIV 16-3069 JB, Instruction No. 20, at 25, filed December 6, 2017 (Doc. 183).

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR 19-2848 JB

VICTOR KEARNEY,

Defendant.

**VERDICT**

WE, THE JURY, find the defendant, VICTOR KEARNEY, \_\_\_\_\_  
(Guilty or Not Guilty)

of Conspiracy, in violation of 18 U.S.C. § 371, as charged in Count 1 of the Indictment.

*In order to find Mr. Kearney guilty of Conspiracy, you must determine whether the government has proven beyond a reasonable doubt that Mr. Kearney committed at least one of the following alleged acts in furtherance of the conspiracy. As for each alleged act, if the jury is unanimous that the government proved beyond a reasonable doubt that Mr. Kearney committed the act, the jury foreperson shall write "true" in the blank next to the alleged act. If the jury cannot agree that the government proved the alleged act, do not fill in the blank next to the alleged act.*

\_\_\_\_\_ On or about October 23, 2009, Mr. Kearney signed a 2007 U.S. Individual Income Tax Return, Form 1040, failing to report that Mr. Kearney received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.

\_\_\_\_\_ On or about August 3, 2011, Mr. Kearney signed a 2008 U.S. Individual Income Tax Return, Form 1040, failing to report that Mr. Kearney received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.

\_\_\_\_\_ On or about June 17, 2012, Mr. Kearney signed a 2009 U.S. Individual Income Tax Return, Form 1040, failing to report that Mr. Kearney received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.

\_\_\_\_\_ On or about June 17, 2012, Mr. Kearney signed a 2010 U.S. Individual Income Tax Return, Form 1040, failing to report that

Mr. Kearney received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.

\_\_\_\_\_ On or about September 6, 2013, Mr. Kearney signed a 2011 U.S. Individual Income Tax Return, Form 1040, failing to report that Mr. Kearney received taxable income from the Mary Pat Abruzzo-Kearney Testamentary Trust B and C.

\_\_\_\_\_ On or about October 1, 2014, Mr. Fiser sent an email message to Mr. Kearney advising Mr. Kearney not to contact the Internal Revenue Service about the failure to file tax returns.

WE, THE JURY, find the defendant, VICTOR KEARNEY, \_\_\_\_\_  
(Guilty or Not Guilty)

of Making and Subscribing a False Return, Statement, or Other Document, in violation of 26

U.S.C. § 7206(1), as charged in Count 2 of the Indictment.

Dated this \_\_\_\_\_ day of March, 2023.

\_\_\_\_\_  
FOREPERSON